ELEVEN ESSENTIAL DWI TRIAL TACTICS

By: Mark Ryan Thiessen

We, the Jury, find the Defendant "Not Guilty." Makes your hair stand on end, drops the weight from your shoulders, and weakens your knees. No sweeter words are ever heard by a criminal defense attorney standing shoulder to shoulder with their client. Not Guilty verdicts are difficult to attain in Driving While Intoxicated (DWI) cases due to anti-DWI propaganda, tragic DWI consequences, and an cultural bias against alcoholism and DWI. This article shares eleven effective trial tactics for a variety of DWI cases.

1. **Be Real, Be You**

As Gerry Spence says, "If you're trying a case on the facts, you'll lose every time." Remember, the State chooses which cases they want to try because they think they can and should win. If the facts were on the client's side and the client should win the case, the State will dismiss or reduce the case. Every case that goes to trial, the State believes the facts are so overwhelmingly in their favor, that they can prove the case beyond a reasonable doubt. So, what do we as defense lawyers have? We have passion, we represent a human being, we have a heart, and people like us.

Imagine the jury, you, and the State are lost in the desert.[1] The State stands up and says: I was a Boy Scout, the sun rises in the East and sets in the West, home is this way, follow me. And then you stand up and say: "I was Boy Scout too, and I also know that as well. My son's name is Baron and my wife is Kendra. I love them both dearly and I *will* see them again. And when I do, I am going to wrap them both up and hug and kiss them." Who are you going to follow out of that desert?

Voir dire is derived from Latin and means "to tell the truth."[2] Voir dire is an opportunity to really and truly know who your jurors are and how they feel about certain issues. By the time the defense attorney gets to speak, the Judge and the State have already told them about the laws they must follow and that this case is a DWI. The defense attorney needs to know some very personal information in order to effectively make strikes for cause. i.e. each jurors own drinking pattern, who has been affected by alcoholism, any one lost a loved one or friend to DWI, any good or bad experiences with police officers, any biases, etc… Before a juror will open up and share their true feelings, they need to trust you. How can that happen instantly? Show them yours and they will show you theirs.[3] Be vulnerable. Be genuine with the jury. Tell the juror something true about yourself. Tell them about you before you start asking about them. What should you share? You can start by sharing (1) the worst thing going on in your life at the moment; and (2) the best thing. Also, promise the jury that you won't ask them any questions that you won't also answer. Tell the jury your personal drinking pattern, whether you have been affected by alcoholism or DWI, and any fears or biases you may have in the case. This allows the

[1] Thanks to the one and only Gerry Spence for this example.
[2] https://en.wikipedia.org/wiki/Voir_dire
[3] Thank you, Gerry Spence.

juror to feel comfortable sharing with you since you are sharing with them, being exposed and vulnerable. If you tell me, I'll tell you; show me yours, I'll show you mine. In the end, it's only fair.

2. Presumption of Innocence

"Innocent until proven guilty" is a phrase every American knows by heart, but do humans truly understand the presumption of Innocence? Jurors are often asked "how many of yall wonder what [s]he did to get here? Where there's smoke there's fire...." Every juror wonders. It's unnatural not to. So, the skilled trial attorney needs to educate the jury on the strength of the presumption of innocence.

There is only one presumption in a criminal case: innocence.[4] If there is only one presumption and that's innocence, can the jury presume the police performed the tests correctly? Can the jury presume the breath or blood test is credible or reliable? Can the jury presume that the client can perform any of the standard field sobriety tests better than he did? NO. The jury may not *presume* anything other than the client is innocent. The presumption of innocence is so powerful that the State must prove their case beyond A reasonable doubt. And, if just A doubt remains, the presumption of innocence prevails.

Think of the presumption of innocence as a compass. Give each juror an imaginary compass to keep with them throughout the entirety of trial. If the juror is ever lost; doesn't know what to believe; who is telling the truth; the compass will point them home: Not Guilty. America errs on the side of freedom. The jury must never convict a human being when a doubt/question/hesitation exists. When in doubt, when confused, the compass points you home: Not Guilty.

3. Beyond A Reasonable Doubt

The legislature refuses to define beyond a reasonable doubt.[5] However, the legislature allows counsel to compare that burden against other burdens of proof.[6] Trial lawyers effectively demonstrate that beyond a reasonable doubt is the highest burden in the land and the top of any stair chart.[7] The skilled trial lawyer will not only educate a jury on how high the burden is, but also simplify this cold legal phrase.

While the legislature may not provide a definition of beyond a reasonable doubt, the skilled trial attorney may provide an "example" of a similar phrase.[8] Break the phrase down to the words and what those words actually mean. What's a synonym of each word? Write the synonym next to each word of "beyond a reasonable doubt" on your display board. Start with your first juror and go down the row. If needed, help the jury discover the synonym. For example: If you went beyond your exit, where did you go? If you have A pineapple, how many pineapples do you have? Stress the "A," it's the shortest, but most powerful word in the phrase. How much is less than A? If my wife is acting reasonable how is she

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[4] Thanks to J. Gary Trichter and his wonderful tutelage on the presumption of innocence.
[5] *Geesa v. State,* 820 S.W.2d 154 (Tex. Crim. App. 1991).
[6] *Contreras V. State,* 2012 WL 5285917 (Tex.App.—Waco, Oct. 25, 2012); *Fuller v. State,* 363 S.W.3d 583 (Tex. Crim. App.2012).
[7] Stair chart from the National College of DUI Defense: http://ncdd.com/ncddstore.php?type=Trial-Graphics
[8] Thanks to trial warrior Steve Gonzalez for this example.

behaving? If you doubt there is water in a pool, what are you going to do at the edge before you run and jump in? Finally, ask the jury: if you have just A reasonable doubt at the end of this case, what must your verdict be? Prepare for objections from the State by clearly stating this is not a definition and just an example. Plan on revisiting this example in closing when stressing the enormity of the State's burden. Couple beyond a reasonable doubt with the presumption of innocence for an overwhelming case the State must prove. In the end, the jury should follow the law and return a verdict of Not Guilty because the State could not prove the case beyond a reasonable doubt.

4. The Rest of the Story

Eighty to ninety percent of jurors make up their mind after opening statement.[9] After a compelling and *real* voir dire, the jurors are anxiously waiting to hear the client's version. Opening statement is when the lawyer gets to tell the jury what they anticipate the evidence will show. It is not evidence. Most routine trial lawyers start their opening off "may it please the court, your Honor, opposing counsel, the evidence will show…" You've just lost the jury. Unless the Court is formal and requires this, don't do it. It is an unnecessary safety blanket better left for law school mock trial competitions. Rather, stand up and tell them your theory of the case, followed by every good quality about your client, and tell them the rest of the client's story that the State conveniently left out.[10] However, do not tell the jury anything that is untrue or that you cannot prove. Credibility with the jury must never falter.

How the defense attorney delivers an opening is just as important as what is said. A crafty trial attorney may attempt to deliver opening by "crawling in the skin"[11] of his client and giving the jury a first-hand account of the rest of the story. Be prepared for objections, and let the Judge and jury know that you anticipate "the evidence will show" all of this to be true. Lastly, since whether the client testifies is a last minute decision after analyzing the need at the close of the State's case, all of the client's relevant background (military history, family, injuries, religion, awards, etc.) can and should be disclosed in opening statement. The jury must absolutely recognize how wonderful your client is and why they need to fight for his freedom. Hopefully, 80-90 percent just made up their mind for Not Guilty. Now the jury is ready to listen, see, and determine what weight to give all the evidence.

5. The First Cross Examination Question

The jury just listened to hours of monotonous, form read direct examination. Finally, the witness is yours. Don't start out: "Good afternoon, Officer, how are you?" or "This is the first time we've ever had the chance to speak about this case." Hit him with a power question, grab everyone's attention.[12] "Officer, if my client would have blown a 0.000 would you have let him go home?" Now the officer has two possible answers, each terrible.

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[9] Johnson, James; Jury Arguments, Winning Techniques; Michigan Bar Journal, page 36 (March 2011); http://vinsoncompany.com/pdf/How_to_Persuade_Jurors.pdf.

[10] Thanks to my officemate and trial warrior Jed Silverman.

[11] *See* Gerry Spence and the Trial Lawyer's College.

[12] Thanks to the amazing Kent Schaffer for his cross examination techniques.

No. Look at the jury and recognize this answer. Even if the everyday citizen is wrongfully arrested and blows a 0.000, they do not get to go home. Hope is lost. There is no way out of the web. Let the State attempt to explain the charging process. If the State or officer attempts to go into drugs, the quick attorney must capitalize by objecting or spinning this in the defense's favor. "So you mean, if we as citizens prove no alcohol in our system, you automatically think drugs?" Align yourself with the jury and help them realize there is no way out.

Yes. Make sure you repeat the answer, so the jury remembers it. Revisit this answer at the end of your cross. In the end, after the officer has stated he chose to arrest based on a "totality of the circumstances," remind him of that first question and answer. Ask the officer how, if he truly saw a loss of mental or physical faculties, could he let them go? Stop there. Don't ask that final question. Save it for closing argument and empower the jury to deliver the conclusion: the mental and physical were normal enough to let the client go had they blown a 0.000.

After your power question, proceed with cross examination as usual.

6. Standard Field Sobriety Test Are Easy…To Fail.

No doubt the State will argue and the trained officer will testify about the simplicity of the Standard Field Sobriety Tests (SFST). The trained officer almost always testifies that these tests are developed by "scientists" for every person and are very easy to pass. That same well trained officer will also testify that people routinely pass the SFSTs and are allowed to go home. Sure.

It's important to note how the officer was trained and how "easy" the tests actually are. Commit the officer that he took a 40 hours course to be certified by the National Highway Traffic Safety Administration (NHTSA) to administer SFSTs. Additionally, the officer recognizes the NHTSA student manual as authoritative on the administration of these tests. The officer was only graded at the end of the course. The officer was not graded on the first day after hearing how to administer the test only one time. And, if the officer missed 3 questions on the certification test, he didn't fail. Additionally, the officer got credit for every correct answer. In fact, the officer has never taken a test where he didn't get credit for correct answers. If you have a 100 question test and miss 3, what's your score? Would you ever take a test where you didn't get credit for the answers you got right? Most seasoned officers will volunteer that NHTSA requires this type of grading and "scientists" developed the grading system. The jury should still realize the unfairness of the unique NHTSA grading method.

The jury should also truly understand these tests in case they wanted to try them, after the trial is over. Start with either test and walk through the exact instructions and break down how many actual instructions each test requires (15 for walk and turn, 13 for one leg stand).[13] How many times did the officer give the client the instructions? How many times does the officer demonstrate the test for the client? Does the officer allow the client to practice before being graded? Was the officer allowed to practice for 40 hours and then some before he was graded on his administration of these tests? Is the client told the clues the officer is looking for? Did the officer tell the client it only takes 2 clues to

[13] *See* NHTSA Standardized Field Sobriety Testing Student Manual August 2006, pg. X-3-5.

indicate intoxication? Did the officer tell the client that injuries, age, or weight may affect the results? Make sure to write these answers on your display board for each test. Next, walk through each clue and show the jury the meticulousness and subjectivity of each clue. Most jurors will appreciate the defense attorney showing them just how *easy* these tests are…to fail.

7. Breath Test - Fifteen Minute Violation

The third prong of *Kelly* states: the technique applying the theory must have been properly applied on the occasion in question.[14] In order for a breath test to be valid, the officer must observe the client for at least fifteen minutes prior to the breath test.[15] The Department of Public Safety produced what is known as the "21 Minute Video."[16] The video shows examples of invalid fifteen minute waiting periods.[17] The first example is when the officer parks his car at the station and opens his door to get out and retrieve the suspect in the back seat.[18] Department of Public Safety clearly recognizes that the officer cannot see through the roof of his car and temporarily loses line of sign with the suspect as the officer gets out to remove the suspect. Always request the dispatch records and mobile data terminal (MDT) records to ascertain the precise time the officer arrived at the station and possibly started the fifteen minute observation period after getting the client out of the back of the car. Many times officers just rush the client right in to the Station to provide a sample. The well prepared defense attorney may have indisputable evidence that a proper fifteen minute waiting period was not observed. Couple this violation with *Kelly* and Texas Code of Criminal Procedure § 38.23 to suppress the breath test.

8. Breath Test – Walking Down the Number

No machine is infallible. The Intoxilyzer 5000EN and Texas Breath Testing have certain acceptable ranges of error. Depending on the particular facts, the skilled DWI defense attorney may walk down the client's breath test result using the machine's own acceptable ranges of error. First, the client's first breath sample must read within 0.02 of his second breath sample.[19] Hypothetically, if a client blows a 0.09 on the first sample, his next breath sample must measure between 0.07 and 0.11 in order to be valid. Additionally, Texas Department of Public Safety uses the lower number of the two breath samples in order to give the benefit of the doubt to the client. Second, the reference sample must measure within 0.01[20] of the reference predicted, which is usually 0.08. Third, the third digit of the breath result is completely random and should be truncated.[21] This means that the machine could read 0.00 as anything up to a 0.009 acceptable range of error.[22] Fourth, the client's temperature can affect the

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[14] *Kelly v. State,* 824 S.W.2d 568 (Tex. Crim. App. 1992).
[15] *See* Texas Breath Alcohol Testing Program Operator Manual, pg. 49 and Texas Administrative Code Section 19.3(a) and (c)(1).
[16] *See* Department of Public Safety 21 Minute Video. Call me for a copy.
[17] *Id.*
[18] *Id.*
[19] *See* Texas Breath Alcohol Testing Program Operator Manual, pg. 13.
[20] *See* Texas Breath Alcohol Testing Program Operator Manual, pg. 13
[21] *See* Gullberg, R.G., *Statistical Evaluation of Truncated Breath-Alcohol Test Measurements,* Journal of Forensic Sciences, JFSCA, Vol. 33, No. 22, March 1988, pp 507-510; Gullberg, R.G., *Distribution of Third Digit in Breath Alcohol Analysis,* Journal of Forensic Sciences, Letters to Editor, Date and Volume Unknown, pp. 976-978.
[22] *Id.*

results of the breath test.[23] For every one degree Celsius the client's body is above 98.6 degrees Fahrenheit or 37 decrees Celsius, the breath test is 8.62% high.[24] And the temperature of the simulator solution is already allowed to be plus or minus 0.2 degrees from 34 degrees Celsius.[25] Breath test scores of 0.13 and below should be vigorously scrutinized due to the inherent unreliabilities in the Intoxilyzer 5000EN and the Texas Breath Alcohol Testing Program.

9. Blood Test – *McNeely* and *Bullcoming*

In April 2013, the Supreme Court effectively established "no-refusal" weekends every day of the year.[26] *McNeely* recognized the ease in obtaining a blood search warrant in most metropolitan areas; henceforth, barring warrantless blood draws without an exigent circumstance.[27] The State has fought back by declaring year round "no refusal."[28] However, in the case where no warrant exists, the totality of circumstances of the particular case is necessary to determine whether exigent circumstances existed making the ascertaining of a blood warrant impractical. The State must show the impracticability of obtaining the search warrant justifying the exigency exception to the warrant requirement.[29] Here, any argument made by a prosecutor regarding the inconvenience or impracticability of obtaining a search warrant prior to an involuntary blood draw should be attacked with *Clay*.[30] In *Clay,* the arresting officer swore to a blood warrant probable cause affidavit over the telephone and then faxed the signed affidavit to the Judge.[31] Arguably, it doesn't get much easier to obtain a blood search warrant.

Additionally, any phlebotomist must be properly qualified as a "qualified technician" for warrantless blood draws.[32] In all blood cases, remember that *Bullcoming* is still good law that requires the actual analyst to testify before the blood results may be admissible, regardless of warrant issues.[33]

10. Disconnect Defense

Whether dealing with a blood or breath test, all high tests (0.16 and higher) are ripe for the Disconnect Defense("DD"). The disconnect lies in the science not adding up to the machine results. The foundation of the DD is sobriety evidence or common sense reasons for mistaken intoxicated behavior. In most cases where the DD is applicable, the client's video is exculpatory for the client. Additionally, obtain the client's medical records or other evidence needed to demonstrate normality for the client and not intoxication.

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[23] *See* Fox, G.R. and Hayward, J.S., *Effect of Hyperthermia on Breath-Alcohol Analysis,* Journal of Forensic Sciences, JFSCA, Vol. 34, No. 4, July 1989, pp. 836-841.
[24] *Id.*
[25] *See* Texas Breath Alcohol Testing Program Operator Manual, pg. 9.
[26] *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 1555 (2013).
[27] *Id.*
[28] http://abclocal.go.com/ktrk/story?section=news/local&id=9176628
[29] *McNeely,* 133 S.Ct. at 1557-60.
[30] *Clay v. State,* 382 S.W.3d 465 (Tex.App.—Waco 2012), review granted, (June 27, 2012).
[31] *Id.* at 465-466.
[32] *Cavazos v. State,* 969 S.W.2d 454, 456-57 (Tex.App. – Corpus Christi 1998, pet. ref'd); TEX. TRANSP. CODE § 724.017(a); *see also Cordero v. State,* 2009 WL 3231504 (Tex.App.—El Paso Oct. 7, 2009).
[33] *Bullcoming v. New Mexico,* —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).

In breath test cases, you can highlight Intoxilyzer deficiencies by analogizing it to hypothetical or other measuring devices, i.e. thermometer, Taxalyzer 5000EN , Doppler 5000. Whatever machine you invent for jury use, use it to demonstrate the obvious error the machine made when contrasted with what you see, i.e. common sense. For example, the importance of embracing common sense by relating it to a dire consequence of being wrong, i.e. brain surgery if a thermometer reads 110°F, jail time for failing to pay taxes, or a natural disaster. Analogize your hypothetical machine with deficiencies in the Intoxilyzer: (1) 20% acceptable range of error; (2) self checking for accuracy; (3) no warranty for merchantability or accuracy; (4) recalled in multiple states; (5) newer model available; (6) citizen cannot purchase from manufacturer; (7) manufacturer refuses to provide source code; (8) not available for independent scientific testing; (9) destroys the only direct evidence of sobriety/intoxication when the State had the ability to save that evidence; (10) operator has no idea how the machine works; (11) "scientist," who does, rarely checks it in person; (12) any inconsistencies or strange occurrences found in test records; etc…

In blood test cases, make sure to walk the jury from cleaning the client's blood draw site through the chromatogram. Depending on the laboratory and people involved you may find: (1) contamination in the blood draw room; (2) expired materials; (3) improper site cleansing; (4) improper blood draw technique; (5) mishandling of the evidence; (6) break in the chain of custody; (7) human error in the laboratory; (8) pipette problems; (9) sample expiration, contamination, or other problems; (10) contamination in the injector port, y-splitter, columns, flame ionization detector; (11) source code issue; (12) sloppy chromatography, etc…. Each step of the way, educate the jury on possibilities of contamination, carry over, or switching vials. Inspect all the chromatograms in the run to further validate your theory.

Regardless whether dealing with a blood or breath test, each is susceptible to the DD.. The skilled attorney must sew the DD through the entire case, from voir dire to closing. The verdict should be an obvious decision that the machine or those running the machine made a crucial mistake, rather than your client's body defying the laws of science. Use the totality of the circumstances against the State by arguing the totality of sober circumstances. Intelligent human beings believe what they know with their own senses to be true instead of blindly relying on a machine result that defies common sense.

11. Storytelling Closing Argument

Closing argument gives the skilled trial attorney the opportunity to seal the case and the client's acquittal or one last chance to steal the case from the grasps of a dry prosecutor. By closing, the jury has been sitting quietly for days, listening to the State continue ad nauseum about the facts. The last thing the jury wants to hear is a recap of all the facts. After all, the jury is human. They want Atticus Finch, Vincent "Vinny" Gambini, Erin Brockovich, Lt. Daniel Kaffee, Franklin and Bash, Denny Crain, or the Lincoln Lawyer. Tell them a story. Put on a show in closing. Sit and think about the theory of the case and how you can relate that theory into an experience that elicits the desired human reaction from the jury. Whatever story that you relate to the case, make sure it's genuine. The jury can tell when you are lying, or you don't believe your own argument. Again, like in voir dire, be vulnerable, show them

yours.[34] Whatever you choose, the closing should be so raw and powerful that you give the jury the righteous indignation to find your client Not Guilty.

DWI consequences include prison, loss of driver's license, fines, and foreign travel restrictions. Accordingly, DWI trials are prevalent in every courthouse. Every criminal lawyer will represent a DWI client at one point in their career. DWI cases are numerous throughout the State. Mothers Against Drunk Driving (MADD) lobbies vigorously against DWI cases. We as defense lawyers, must break through the bias and hatred for DWI and humanize our client and their story. The jury should return a Not Guilty verdict because they are following the law and making the State prove their case beyond A reasonable doubt.

[34] Gerry Spence.